

Shoreline Master Program Updates

Existing development

Introduction

Many of Washington's 28,000 miles of shorelines are developed. Freight containers dock and unload at port facilities. Marinas provide in-water and dry storage for recreational and commercial boats. Public parks offer swimming beaches and boat docks. Single family homes and multifamily buildings offer their residents sunset views and quick access to the water. Commercial buildings feature retail shops and restaurants.

Development that's within shoreline jurisdiction (see SMP Handbook Chapter 5) falls under the authority of the Shoreline Management Act (SMA), which is enacted through local Shoreline Master Programs (SMP). As local governments update their SMPs and approve new regulations, questions arise about what will happen to existing structures and uses along shorelines.

Existing development is "grandfathered"

Existing legally established structures and uses are typically "grandfathered" with the approval of updated SMPs. That means they can continue to exist, be used, and be maintained and repaired. That's the case even if the updated SMPs include regulations that would not allow new development to be built exactly as existing development. For example, new buildings may need to be further away from the water, or new development projects may need to retain some vegetation onsite.

Existing development will remain in place and continue to be used. Homeowners can continue to live in their houses and grow vegetables in their gardens. Local governments sometimes allow existing "grandfathered" buildings to be expanded, although there may be limits to the size of the addition, the total square footage, new stories, or new impervious surfaces.

Ecology and local governments do not expect most existing development to be eliminated from the shoreline after new SMP regulations are adopted. Local governments may determine that certain development should be eliminated – for example, dilapidated buildings in hazard areas such as steep eroding slopes, older uses that are not compatible with surrounding uses, or abandoned structures.

There are different ways to address continuance and expansion of buildings, structures and uses that don't quite meet the new SMP regulations. This guidance discusses ways local SMPs can address existing development.

No net loss starts with existing development

The updated SMPs must include policies and regulations to achieve “no net loss” of shoreline ecological functions. The current conditions of the shorelines, including existing development, are the starting point or baseline for determining no net loss. It will be important to know what shoreline development looks like when options for managing existing development are considered. Are shoreline lots big or small? Are lots mostly covered by impervious surfaces? Are there big lawns? Is native vegetation present? Is the shoreline armored with bulkheads?

The no net loss goal needs to be part of the decision-making process regarding future development – both new development and expansion or renovation of existing development. Local governments need to consider how the impacts of future development will be mitigated.

Cities with densely developed shorelines may have fewer opportunities for achieving no net loss than cities or counties with less developed shorelines. With a densely developed shoreline, large buffers or setbacks may not be appropriate or feasible for various reasons -- small lots cannot accommodate them; large buffers would include many structures and impervious surfaces that interfere with buffer functions; regulations regarding structures within buffers could be complicated.

If the SMP allows existing structures to expand, how will the impacts of the expansion be mitigated?

- Is there room on the lots to plant native vegetation?
- Are rain gardens and other low impact development techniques feasible to mitigate stormwater impacts?
- Do wind and wave conditions allow for removal of bulkheads?
- Are there sites within the city for off-site mitigation if no space is available onsite? In some small cities, there are limited opportunities for off-site mitigation.

If new impacts cannot be avoided or mitigated, the no net loss standard may be difficult to achieve. Ecology cannot approve draft SMPs unless policies and regulations are designed to achieve no net loss.

Traditional approach

Traditionally, uses and structures that are not consistent with the new regulations have been categorized as “nonconforming” development. Nonconforming uses and development were lawfully constructed or established, but do not conform to current land use regulations or standards. The creation and regulation of nonconforming uses and development are old issues, beginning early in the 20th century, when municipalities started enacting zoning regulations.

After the SMA became law and SMPs were developed, the concept of nonconforming uses and development carried over to shorelines regulations. Not all of the SMPs adopted in the 1970s and early 1980s included clear provisions for nonconforming development. To ensure clarity, Ecology adopted nonconforming development regulations in 1986 in the former WAC 173-14. The regulations were revised and then incorporated in the updated WAC 173-27-080 in 1996. These regulations apply at the local level only if the local SMP does not address nonconforming development.

The term, “nonconforming use” is often used to mean both uses and development or structures. This guidance refers to use, development or structures, and lots.

- A **use** is nonconforming if it would not be approved under the current regulations. An example is a commercial use within an area designated for residential uses.
- A **development or structure** is nonconforming if it is located or configured in ways that do not meet current standards. A common example along shorelines is a single-family residence that does not meet current setback standards. In these cases, the **use** is consistent with the shoreline regulations, but the **structure** does not meet one or more standards in the existing regulations. Piers and docks that are larger than the current regulations allow also are examples of nonconforming structures.
- **Lots** that were legally established prior to the effective date of the current SMP and do not conform to the current lot size standards also are nonconforming.

Many SMPs define nonconforming structures, uses and lots; address expansion, changes in use, and rebuilding after fire or natural disaster; and set timelines for permitting, reconstruction and abandonment.

The regulation of nonconforming development sometimes is a contentious issue during SMP updates. The word “nonconforming” has raised concerns and confusion among property owners. Home owners seem to be the most worried about having a “nonconforming” label on their property. Their concerns and questions include:

- Can they repair and maintain their house?
- Will homeowners insurance cost more?
- Will they be able to get a loan for house repairs or improvements?
- Will potential buyers be able to get a mortgage?

Other property or business owners wonder if they can they continue the existing use, such as a retail shop, or will they need to close and move?

Nonconforming development is discussed in more detail later in this document.

Optional approaches

Some local governments are proposing different approaches as they update their SMPs. They would allow existing structures, particularly single family residences, to continue as conforming structures even though new shoreline setbacks, buffers, and other regulations in their Shoreline Master Programs would typically create nonconforming structures.

Non-traditional approaches to existing structures include:

- Excluding the footprint of the existing structures from the buffer or setback. Depending on the size of the buffer, it may wrap around the sides and rear of the structure but will not include the structure. On some urban shorelines, significant amounts of trees and vegetation exist behind houses, away from the water. Larger buffers may be appropriate in these areas.
- Stating in the SMP that all legally-established existing structures are conforming structures.

Local governments that opt to classify certain structures as conforming should keep a record of their decisions, including why they decided to use this approach, and how the impacts on the shoreline environment compare with the expected impacts from an SMP that creates nonconforming development through use of shoreline buffers or setbacks. Though there may be little or no differences in impacts, it's important to be able to show how you arrived at your decision, per the "show your work" mandate from the Growth Management Hearings Board.

Amendments to SMA

The State Legislature approved two bills that related to residential structures during the 2011 Legislative session. With these bills that amend the SMA, the Legislature responded to concerns of residential property owners about the potential nonconforming status of their property with new shoreline regulations.

1) SSB 5451 states that new or amended SMPs approved by Ecology after September 1, 2011 may include provisions that allow:

- (a) Legally established residential structures and appurtenant structures that are used for a conforming use to be considered a conforming structure even though they do not meet SMP standards for setbacks, buffers, yards, area, bulk, height or density;
- (b) Redevelopment, expansion, change with the class of occupancy or replacement of the residential structure if consistent with the SMP, including the provisions for no net loss of shoreline ecological functions.

The bill defines appurtenant structures as garages, sheds and other legally established structures, but does not include bulkheads and other shoreline modifications and over-water structures. The legislation does not restrict master programs from limiting redevelopment, expansion or

replacement of over-water structures in hazardous areas such as floodplains and geologically hazardous areas.

The bill is available at

<http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Law%202011/5451-S.SL.pdf>

2) Another bill, SHB 1783, addresses floating homes with an amendment to RCW 90.58.270. The Legislature recognizes that existing floating homes “are an important cultural amenity and element of our maritime history.”

With this bill, a floating home that is permitted or legally established prior to January 1, 2011, must be classified as a conforming preferred use. “‘Floating home’ means a single-family dwelling unit constructed on a float, that is moored, anchored, or otherwise secured in waters, and is not a vessel, even though it may be capable of being towed.”

As a conforming preferred use, a floating home and its moorage can have only reasonable conditions and mitigation applied that will not preclude maintenance, repair, replacement and remodeling. The bill is available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Session%20Law%202011/1783-S.SL.pdf>.

SMP inventory and regulations

Local governments using these approaches will need to provide a detailed inventory and assessment of buffer functions as a baseline to compare how the optional approach would affect the natural shoreline resources. For example, if along a specific shoreline reach, water quality filtration functions are determined to occur within 100 feet of the OHWM, future development impacts due to increased impervious surfaces must be related to specific water quality treatment measures. For example, low-impact development methods should offset the impact and yield no net loss of function from the current conditions.

Nontraditional approaches for existing development must be:

- Limited to structures only. Uses that would not be allowed under the new SMP should not be included.
- Limited to legally established structures only.
- Not applied to overwater residences, except for floating homes that were legally established or permitted prior to January 1, 2011, as discussed above. New overwater residences are not allowed under the SMP Guidelines, so existing overwater residences other than floating homes are nonconforming uses and nonconforming structures.

Ecology will require SMP regulatory language that is clear and precise and, at a minimum, include regulations to address the questions listed below. Otherwise, these issues will inevitably arise during implementation of the SMP. Regulations are needed to ensure consistency in

treatment of these conforming structures so that the SMP does not default to WAC 173-27-080, Ecology's regulation for nonconforming development.

- Does the approach apply throughout shoreline jurisdiction or in specific environment designations or shoreline reaches only? It may not be appropriate in all shoreline areas.
- Is it limited to single family residences? Are appurtenances such as garages included? Are other residential-related uses such as sheds, driveways, or tennis courts included?
- Are water-related uses and nonwater oriented uses included?
- Are there clear procedures and criteria for considering when expansion of these conforming structures would be allowed? Can the footprint be expanded? Will additional stories be allowed? Are there specific limits to expansion such as percent of existing square footage, maximum impervious surface, maximum square footage, etc.? Expansions toward the water or over the water should generally not be allowed.
- Will replacement in the event of a disaster such as a fire or earthquake be allowed? Is replacement limited to the footprint prior to the disaster?
- Will replacement for other reasons be allowed?
- Are expansions of structures on old fills that were placed waterward of the OHWM allowed or only allowed upland of the structure?
- How is view blockage from adjacent residences and upland streets and aesthetic consequences along the shoreline reach addressed?
- What mitigation will be required for expansion? This could include removing bulkheads, adding vegetation, improving stormwater facilities, or other measures. Mitigation measures should be carefully reviewed during the permit process to ensure they mitigate the impacts of the development.
- Are there regulations regarding retention and replacement of trees and other vegetation within buffers or elsewhere on the property?
- What setbacks and buffers will be put in place?
- What can be built in the buffer or setback?
- Is a shoreline conditional use permit or variance required for expansion? In what circumstance?
- How will the no net loss standard be met? How will the baseline ecological functions be retained or enhanced?

- How will abandoned structures be addressed?

A generalized statement in the SMP that simply says that all existing structures are conforming, or that simply excludes all existing structures from the buffer, and does not address the issues above, is not likely to be consistent with the no net loss standard.

Other things that local governments should think about:

- How would these alternative approaches within shoreline jurisdiction mesh with the nonconforming standards and other provisions of the zoning code, flood ordinances, building codes, and with the critical areas ordinance?
- Under some circumstances, local governments may determine certain structures to be nonconforming. For example, in some marine reaches, summer vacation cabins have been allowed in the past, but are now determined to be in hazardous slide areas. Local government may decide to designate such structures as nonconforming and not allow further expansion. In hazardous areas such as floodways, replacement of substantially damaged or destroyed structures may be required to be located out of the hazard area or in an area of significantly lower risk.

Nonconforming development

Local governments that choose one of the options discussed above, as well as local governments that will take the traditional approach toward nonconforming development in shoreline areas, both need nonconforming development language in the SMP.

Why would local governments that choose the nontraditional options need language in the SMP about nonconforming development?

- Some uses, structures and lots may still be nonconforming. Overwater residences except for floating homes, as discussed above, are nonconforming uses and nonconforming structures. Uses that would not be allowed under the SMP are nonconforming uses; for example, a factory in a shoreline residential environment designation. Lots that do not meet the standards of the SMP are nonconforming lots.
- Variances may create nonconforming structures. The SMP should set the parameters for new development and redevelopment. Local government will need to decide whether any development that is outside those parameters and requires a variance will be nonconforming and will meet the no net loss requirement.
- The nonconforming language in WAC 173-27-080 will apply to any nonconforming uses, structures and lots if the SMP does not include nonconforming language.

The rest of this document provides background information on regulation of nonconforming uses and development in Washington. It includes the Department of Ecology standards for nonconforming uses and development, reviews relevant court and board cases, and provides

examples of custom nonconforming provisions in Shoreline Master Programs (SMP) that Ecology has approved.

Washington statutes

Within the general framework of the Constitution and case law, Washington State local governments have significant flexibility for defining and addressing nonconforming uses and development. Historically, nonconforming uses and development have not been addressed by State legislation in Washington.

However, in March 2010, the Governor signed EHB 1653, which adds special provisions to the Growth Management Act (GMA) regarding existing uses in Shoreline areas. First, the bill clarifies that critical areas regulations adopted under the GMA remain in effect within shoreline jurisdiction until Ecology adopts a comprehensive SMP update or SMP amendment specifically related to critical areas.

The bill also provides that *legally existing structures and uses within critical areas buffers in shoreline jurisdiction are considered to be “conforming”* under the GMA, and may continue during the time the critical areas regulations remain in effect. Special provisions are included regarding change or expansion of these existing uses. More information is available at <http://www.ecy.wa.gov/programs/sea/sma/news/reconsider.html>)

As discussed earlier, the Legislature addressed residential uses and floating homes in the context of conforming structures during the 2011 Session. See the discussion under “[Amendments to SMA.](#)”

Ecology shoreline regulations

The WAC regulations about nonconforming development apply at the local level only if the local SMP does not address nonconforming development. These standards reflect the basic policy expressed in several Washington court decisions and the policy of the SMA to provide for preferred uses and protect shoreline habitat.

For purposes of shoreline management under the SMA, nonconforming use or development is defined as:

“ a shoreline use or development which was lawfully constructed or established prior to the effective date of the act or the applicable master program, or amendments thereto, but which does not conform to present regulations or standards of the program (WAC 173-27-080(1)).

The WAC also addresses nonconforming lots:

(10) An undeveloped lot, tract, parcel, site, or division of land located landward of the ordinary high water mark which was established in accordance with local and state

subdivision requirements prior to the effective date of the act or the applicable master program but which does not conform to the present lot size standards may be developed if permitted by other land use regulations of the local government and so long as such development conforms to all other requirements of the applicable master program and the act.

The WAC nonconforming regulations are provided below.

WAC 173-27-080

Nonconforming use and development standards

When nonconforming use and development standards do not exist in the applicable master program, the following definitions and standards shall apply:

(1) "Nonconforming use or development" means a shoreline use or development which was lawfully constructed or established prior to the effective date of the act or the applicable master program, or amendments thereto, but which does not conform to present regulations or standards of the program.

(2) Structures that were legally established and are used for a conforming use but which are nonconforming with regard to setbacks, buffers or yards; area; bulk; height or density may be maintained and repaired and may be enlarged or expanded provided that said enlargement does not increase the extent of nonconformity by further encroaching upon or extending into areas where construction or use would not be allowed for new development or uses.

(3) Uses and developments that were legally established and are nonconforming with regard to the use regulations of the master program may continue as legal nonconforming uses. Such uses shall not be enlarged or expanded, except that nonconforming single-family residences that are located landward of the ordinary high water mark may be enlarged or expanded in conformance with applicable bulk and dimensional standards by the addition of space to the main structure or by the addition of normal appurtenances as defined in WAC [173-27-040](#) (2)(g) upon approval of a conditional use permit.

(4) A use which is listed as a conditional use but which existed prior to adoption of the master program or any relevant amendment and for which a conditional use permit has not been obtained shall be considered a nonconforming use. A use which is listed as a conditional use but which existed prior to the applicability of the master program to the site and for which a conditional use permit has not been obtained shall be considered a nonconforming use.

(5) A structure for which a variance has been issued shall be considered a legal nonconforming structure and the requirements of this section shall apply as they apply to preexisting nonconformities.

(6) A structure which is being or has been used for a nonconforming use may be used for a different nonconforming use only upon the approval of a conditional use permit. A conditional use permit may be approved only upon a finding that:

(a) No reasonable alternative conforming use is practical; and

(b) The proposed use will be at least as consistent with the policies and provisions of the act and the master program and as compatible with the uses in the area as the preexisting use.

In addition such conditions may be attached to the permit as are deemed necessary to assure compliance with the above findings, the requirements of the master program and the Shoreline Management Act and to assure that the use will not become a nuisance or a hazard.

(7) A nonconforming structure which is moved any distance must be brought into conformance with the applicable master program and the act.

(8) If a nonconforming development is damaged to an extent not exceeding seventy-five percent of the replacement cost of the original development, it may be reconstructed to those configurations existing immediately prior to the time the development was damaged, provided that application is made for the permits necessary to restore the development within six months of the date the damage occurred, all permits are obtained and the restoration is completed within two years of permit issuance.

(9) If a nonconforming use is discontinued for twelve consecutive months or for twelve months during any two-year period, the nonconforming rights shall expire and any subsequent use shall be conforming. A use authorized pursuant to subsection (6) of this section shall be considered a conforming use for purposes of this section.

(10) An undeveloped lot, tract, parcel, site, or division of land located landward of the ordinary high water mark which was established in accordance with local and state subdivision requirements prior to the effective date of the act or the applicable master program but which does not conform to the present lot size standards may be developed if permitted by other land use regulations of the local government and so long as such development conforms to all other requirements of the applicable master program and the act.

Nonconforming uses and development in an SMP

SMPS should include provisions to address local government decisions that determine uses and properties are nonconforming (WAC 173-26-191(2)(a)(iii)(A). Ecology does not expect, nor is it asking, local governments to eliminate nonconforming development from shorelines. Some nonconforming uses and structure within shoreline jurisdiction have existed for many years.

Options for addressing nonconforming situations include:

- Use the tried and tested nonconforming standards in WAC 173-27-080.
- Use some provisions of WAC 173-27-080 and revise others to meet local needs.
- Write new nonconforming provisions.
- Use the same nonconforming provisions that are in the local zoning code. This will provide consistent treatment of nonconforming uses and development within and outside shoreline jurisdiction.

If your SMP does not include regulations regarding nonconforming development, WAC 173-27-080 will apply within your municipality's shoreline jurisdiction.

General “sideboards”

SMP language should be within the parameters of case law on nonconforming development. (For your convenience, some of those cases are discussed below.) The basic general “sideboards” for nonconforming development regulations include:

- “Grandfathered” (nonconforming) existing legal uses and structures may continue.
- Owners of grandfathered structures that wish to expand the structure may be able to do so if they do not increase the nonconformity. For example, a house partially within the buffer could be expanded outside the buffer.
- Local governments should develop use regulations using the information in their shoreline inventory and analysis and should avoid creating nonconforming development as much as possible. Local governments should assign environment designations and develop use regulations with the existing pattern of shoreline uses in mind and may adopt incentives or other programs in such areas to accommodate existing development while still meeting no net loss.
- Local governments have the right to terminate nonconforming development. (On occasion, an existing use may have a high potential for use conflicts, such as a fuel storage facility within a city's wellhead protection zone. In these cases, a specific time may be set for the use to be amortized and removed.)
- As reflected in case law, local governments may adopt regulations to phase out nonconforming development over time. More commonly, phasing out is accomplished by adopting disincentives such as strict limits on change of use or expansion.
- For updated SMPs, the “no net loss” policy objective should guide review of proposed expansions or other changes to grandfathered uses and new development on substandard

vacant lots.

- SMPs need to cover the breadth of the nonconforming provisions that are in WAC 173-27-080 including those listed below. (The questions on pages 4 and 5 for conforming structures should also be considered for nonconforming structures.)
 - Definitions.
 - Structures – maintenance and repair, expansion, moving the structure.
 - Uses – expansion, change in use.
 - Reconstruction after damage, including timelines for permitting and reconstruction. Ecology suggests that SMPs include criteria to avoid reconstruction in hazard areas.
 - Abandonment.
 - Undeveloped lots.

The nonconforming provisions in an SMP should distinguish nonconforming uses from nonconforming structures. A nonconforming structure may contain a conforming use. For example, a single family residence in a Shoreline Residential environment is a conforming use. If it is located within the shoreline buffer, it is a nonconforming structure but still a conforming use.

Benign or detrimental nonconformities

A recent *Zoning Practice* article suggests that local governments consider whether nonconforming developments are “benign” or “detrimental” and develop separate regulations for development falling within these categories. This may help determine whether nonconformities should be terminated over time or allowed to continue. (“Distinguishing Between Detrimental and Benign Nonconformities,” V. Gail Easley and David A. Theriaque, *Zoning Practice*, November 2009, Issue No. 11, American Planning Association.) However, in critical area buffers and shorelines, the cumulative impact of numerous minor or lesser impacting “benign” developments should be considered.

No net loss of ecological functions

SMPS must, over time, achieve no net loss of shoreline ecological functions. The SMP update process will include a cumulative impacts analysis and no net loss report that show how the SMP will achieve no net loss.

Nonconforming regulations must be included in those analyses. If the draft SMP would allow single family residences to be built on nonconforming lots, the analyses should reflect how no net loss will be achieved despite such development. The potential expansion of nonconforming development such as residences or other structures such as piers and docks, commercial or industrial buildings also should be included in the no net loss analyses.

Court cases and Shorelines Hearings Board cases

Hearings boards and courts in Washington have dealt with the nonconforming development issue under the Shoreline Management Act (SMA) and other land use statutes for more than three decades.

Some key points from the following Court and Shorelines Hearings Board (SHB) cases:

- Washington state laws do not address the regulation of nonconforming development, and leave this issue primarily to local governments to resolve. (Note the 2010 changes to the GMA mentioned earlier.)
- Nonconforming development (uses and structures) is generally disfavored.
- Nonconforming development is routinely allowed to continue, at least for some time.
- A nonconforming status grants the development the right to continue to exist, but does not assure the right to significantly change, enlarge or alter the development.
- Limited expansion of a nonconforming structure might be permissible because it is tied to other actions to bring the overall use into conformity (e.g., upgrade of nonconforming septic system).
- Local ordinances can terminate nonconforming development that is abandoned or presents a hazard, or provide for it to cease over time.
- The language in the SMP is critical to the resolution of SHB and Court cases.

Some Court and Shorelines Hearings Board cases that are applicable to nonconforming development regulations in an SMP include those shown below.

136 Wn.2d 1, Rhod-A-Zalea v. Snohomish County: In this case, the Washington Supreme Court supported Snohomish County's decision to require a grading permit for an existing nonconforming peat mining operation. The paragraphs below, taken from the case, discuss the theory of zoning in regards to nonconforming use and Washington State laws silence on the regulation of nonconforming use.

A nonconforming use is a use which lawfully existed prior to the enactment of a zoning ordinance, and which is maintained after the effective date of the ordinance, although it does not comply with the zoning restrictions applicable to the district in which it is situated. See 1 Robert M. Anderson, American Law of Zoning § 6.01 (Kenneth H. Young ed., 4th ed. 1996.)

The theory of the zoning ordinance is that the nonconforming use is detrimental to some of those public interests (health, safety, morals or welfare) which justify the invoking of the police power. Id. at 220. Although found to be detrimental to important public

interests, nonconforming uses are allowed to continue based on the belief that it would be unfair and perhaps unconstitutional to require an immediate cessation of a nonconforming use. Id. at 218. A protected nonconforming status generally grants the right to continue the existing use but will not grant the right to significantly change, alter, extend, or enlarge the existing use. Id. Moreover, zoning ordinances may provide for termination of nonconforming uses by abandonment or reasonable amortization provisions. See R. SETTLE, WASHINGTON LAND USE § 2.7(d).

While some states' authority to terminate, alter, or extend nonconforming uses is expressly granted or withheld in zoning enabling acts, Washington's enabling acts are silent regarding the regulation of nonconforming uses. See R. SETTLE, WASHINGTON LAND USE § 2.7(d). Instead, the state Legislature has deferred to local governments to seek solutions to the nonconforming use problem according to local circumstances. In Washington, local governments are free to preserve, limit or terminate nonconforming uses subject only to the broad limits of applicable enabling acts and the constitution. See id.

Meridian Minerals v. King County, 61 Wn. App. 195 (1991): The Washington Supreme Court supported King County's decision to withhold a permit for expansion of a nonconforming rock quarry. Language from the decision discusses nonconforming uses.

The various owners of the Veazie Valley quarry have been allowed to continue a nonconforming use since 1958. That use can continue as long as it remains similar in kind to the use that became vested, the use at the time zoning occurred. Although railroad use of rock may have declined over the years and BNRR may be one of the last to need rock from the quarry, Washington has long adhered to the policy of phasing out nonconforming uses. Anderson; Bartz; Coleman v. Walla Walla, [44 Wn.2d 296](#), 266 P. 2d 1034 (1954); Cain. The generally accepted method of eliminating nonconforming uses "is to prevent any increase in the nonconformity and, when changes in the premises are contemplated . . . to compel . . . a lessening or complete suppression of the nonconformity". Anderson, at 323 (quoting 147 A.L.R. 167, at 168. The use of the quarry, not its ownership, was at issue when BALD declined to process Meridian's permit application.

Jukanovich v. Ecology, SHB No. 06-013: In this summary judgment, the Shorelines Hearings Board supported Ecology's denial of a variance for reconstruction of a house within the shoreline setback.

While it is true that the house has not been moved closer to the water on the ground level, nor has the footprint changed, the Board concludes that adding nearly sixteen and one-half feet of height to the house, as well as creating additional interior square footage, enlarges, intensifies, and increases the encroachment of the house within the setback. The Board agrees with Ecology that "the setback does not just define a line that runs along the ground, beyond which development is prohibited. The setback line extends up into the air as well, to include the space above the ground." 11. This interpretation is consistent with the definition of "setback" in the SCSMA which states "A required open space, specified in shoreline master programs, measured horizontally upland from and perpendicular to the ordinary high

water mark.” SCSMA, p. J-9. See also SCC 30.23.100(2)(“every required setback shall be open and unobstructed from the ground to the sky except for trees and other natural vegetation.”)

Garlick et.al. v Eiford et.al., SHB No. 95-6: This SHB case is a relevant decision to nonconforming residential structures. The decision states that nonconforming structures and uses are disfavored. The Board approved increasing the size of the home in the setback to allow a two-car garage, although the size increase was less than requested because the Board denied an over-the-garage living space.

While we recognize that the overall policy of the SMA favors single family residences, we believe that the establishment of setback lines which create non-conforming development in existing neighborhoods, are logically intended to phase out the residential use within the setback area. If this is not the ultimate goal, these setback requirements are of little consequence, other than to invite the piecemeal granting of variances, until the setback becomes a nullity. The WCSMP is consistent with the concept of limiting the expansion of non-conforming development. Section 23.50.92, for example, restricts repair of non-conforming developments to work which will not increase the non-conformity. Section 23.50.93 similarly restricts the reconstruction of any pre-existing non-conforming developments. It would be inconsistent with the liberal construction of the SMA to deduce from these sections that proposals to expand non-conforming residential development may be approved, based on the personal desires of the applicant.

73 Wn. App. 576, Jefferson Cy. v. Seattle Yacht Club, 1994: The Court of Appeals remanded to the SHB the Superior Court order affirming the SHB's decision to allow a yacht club outstation at Port Ludlow Bay. The Court directed the SHB to reconsider its decision to “reconsider the proposal's compatibility with the area immediately adjacent to the proposed site without considering any nonconforming use.”

Because nonconforming uses are disfavored, and because the public policy of this state is to restrict such uses so that they may ultimately be phased out, see, e.g., Keller v. Bellingham, [20 Wn. App. 1](#), 9, 578 P.2d 881 (1978), aff'd, [92 Wn.2d 726](#), 600 P.2d 1276 (1979), we believe that nonconforming uses are not precedent for other uses. That is, a finding of compatibility cannot, in our view, be substantially based on the existence of a nonconforming use in the area in question.

Guy Fox v. Ecology, SHB NO. 00-025: In this case, the SHB overturned Ecology's denial of a conditional use permit to enclose a deck as long as the change was linked to installation of a septic system.

First, it is important to note that the enclosure of the deck will not increase the non-conformity. Accord, Gambriell v. Mason County and Ecology, SHB 91-26 (1992) (enclosure of a deck to add a dining room did not increase the nonconformity as the same area that violated the setback was not increased.) The degree to which the nonconforming structures on the Fox property will be over the water will remain the same.

Second, the area around Mr. Fox's property is highly developed with many residential homes that are either over the water or behind nonconforming bulkheads. Many of these residential developments are much further waterward and are much larger in scale than Mr. Fox's very small 10 feet by 13 feet cabin. Allowing Mr. Fox to enclose an existing deck to add a bathroom and expanded kitchen will not grant him a special privilege but will merely make his home more in conformity with the surrounding area.

Third and most importantly, there has been no evidence of any environmental harm that will result from allowing this very modest request. If there is no environmental harm, allowance of this expansion will foster "all reasonable and appropriate uses" and will recognize the preference given to single-family development. RCW 90.58.020.

Stephen and Beverly Davis v. Pierce County and the Department of Ecology, SHB NO. 03-021: In this case, the board said the increasing the footprint of a small cabin that was a nonconforming use and adding a second story, which more than doubled its size, could not be authorized.

Because the 525 sq. ft. cabin is acknowledged as nonconforming use, the structure on the site today cannot be authorized unless the terms for expanding a nonconforming use are met. Expansion of a nonconforming use is addressed in PCC 20.72.050:

Any proposed expansion of a use determined by the Planning Department or the appropriate reviewing authority to be nonconforming shall be permitted provided all of the following criteria are met:

- A. The proposed change will make the use more compatible with the environment in which it is located.*
- B. That water, air, noise and other classes of pollution will not exceed the level customarily found in that particular environment.*
- C. That the public health, safety and welfare will not be adversely affected.*

5.

In this case, doubling the size of the cabin will not make the structure more compatible with the rural residential shoreline environment in which it is located. Allowing expansion of nonconforming structures, without compelling circumstances, would also be adverse to the public welfare (PCC 20.72.050(C)) and the orderly development of shorelines contemplated by the Shoreline Act. (RCW 90.58.020).

Nonconforming language in new SMPs

Local governments that have adopted comprehensive SMP updates since 2004 have addressed nonconforming development in various ways. Below are some examples. Check Ecology's website at <http://www.ecy.wa.gov/programs/sea/shorelines/smp/status.html> for links to SMPs that are approved by Ecology.

Douglas County: Adopted WAC 173-27-080 into its SMP.

City of Marysville: Incorporated the nonconforming provisions of its zoning code into its SMP. The zoning code allows nonconforming structures and uses "to continue in existence, and to be repaired, maintained, remodeled, expanded and intensified, but only to the extent expressly allowed by the provisions of this chapter. It is the purpose of the city to ultimately have all structures and uses brought into conformity with the land use codes and regulations duly adopted by the city, as the same may be amended from time to time. Nonconforming structures and uses should be phased out or brought into conformity as completely and as speedily as possible with due regard to the special interests and property rights of those concerned." (Ord. 2131, 1997). (MCC 19.44.010)

City of Monroe: Adopted WAC 173-27-080 into its SMP.

City of Port Townsend: Adopted nonconforming provisions that address the local shoreline conditions. The nonconforming chapter has separate sections for uses, standards and lots. Change of ownership, tenancy or management does not affect the use's nonconforming status. Additional development of property that includes a nonconforming use requires new uses to conform to the SMP. Nonconforming status is lost if the use is discontinued for 365 continuous days.

Nonconforming structures except for residences that are damaged one -half or more of replacement cost can be restored only if the restoration conforms to the SMP. Residences destroyed by catastrophe and in a residential zone may be reconstructed to the size, density and location that existed prior to the catastrophe. Additional provisions can be found in Port Townsend's SMP.

Whatcom County: The County's new SMP requires a variance for expansion of nonconforming structures, except for single family residences which meet certain requirements. The SMP establishes shoreline buffers of 100 to 150 feet. A small percentage of shoreline lots that are vacant are too small to meet the buffer requirements for new development. The SMP allows for development on these lots that have a building area not located in a hazard area.

The provisions from Whatcom County's SMP provided below show one approach regarding nonconforming structures and lots. Comments in the following section are from Barry Wenger, Ecology Regional Planner at the Bellingham Field Office.

Whatcom County's Non-conforming Development provisions located at Chapter 23.50.07

- D. *Non-conforming **structures** may be maintained, repaired, renovated, or remodeled to the extent that non-conformance with the standards and regulations of this Program is not increased, provided that a non-conforming development that is moved any distance must be brought into conformance with this Program and the Act; provided further, that as a conditional use a non-conforming dock may be modified, reoriented or altered within the same general location to be **more** consistent with the provisions of this SMP.*

Comment - The above provision allows structures to be maintained, and minor location adjustments of dock/float structures, to improve consistency with the SMP without defaulting to the current standards. This approach provides an incentive for non-conforming dock owners to make environmental improvements through an administrative conditional use rather than tearing the entire structure out and applying for a shoreline variance that has little chance of approval. An administrative conditional use is only processed by staff before being sent to Ecology for final determination rather than going through a long and expensive Hearing Examiner process at the local level.

- E. *Non-conforming structures that are expanded or enlarged must obtain a variance or be brought into conformance with this Program and the Act; provided that, non-conforming single family residences may be expanded without a variance where the provisions of SMP 23.50.07.I apply; and provided further, that non-conforming structures with conforming uses within commercial or mixed-use developments may be expanded or enlarged within the existing building footprint as a conditional use pursuant to Ch 23.100.05.B.1(e).*

Comment - Non-conforming residences that are located in the setback/buffer may be expanded landward, laterally or vertically within the side yard/height limits via an administrative conditional use, provided the vegetation buffer is tailored and identified for the lot, a notice recorded with the county auditor, and mitigation provided commensurate for any buffer impacts [SMP 23.50.07.I]. Expansion waterward of the existing foundation walls, into the side yard setbacks, or above the height limit requires a shoreline variance.

Non-conforming structures that are expanded or enlarged must obtain a variance or be brought into conformance with this Program and the Act; provided that, non-conforming single family residences may be expanded without a variance where the provisions of SMP 23.50.07.I apply; and provided further, that non-conforming structures with conforming uses within commercial or mixed-use developments may be expanded or enlarged within the existing building footprint as a conditional use pursuant to Ch 23.100.05.B.1(e).

Comment - The second part of Section E allows by conditional use conforming commercial or mixed use development within a non-conforming structure to modify or alter the shape of the structure within the same footprint to meet development needs i.e. change rooflines, add windows, etc. Section 23.100.05.B.1(e) requires public access and restoration be provided with the additional design flexibility.

Non-conforming lots

Comment - Owners of vacant lots that are too small to meet the new setbacks/buffers and are not located in a hazard area may take advantage of the following provision that allows a “building area” disturbance of 2,500 square feet as far from the water as possible, unless a shoreline variance is authorized. In no case shall the new structure be located closer to the water than the existing common-line setback within 50 feet of and between the two adjacent existing residences. The tailored vegetative buffer is required to be identified and provided, a notice recorded with the county auditor’s office, and mitigation provided for buffer impacts [SMP 23.90.06.B.3]

K. *New single family development on non-conforming lots consisting of property under contiguous ownership less than 20,000 square feet in size and not subject to landslide hazard areas, alluvial fan hazard areas, or riverine and coastal erosion hazard areas or associated buffers as provided in WCC 16.16.310 may be allowed without a variance in accordance with the following criteria:*

1. *Non-conforming lots with a building area of 2,500 square feet or more available for a single family residence and normal appurtenances and unrestricted by setbacks or buffers from shorelines or critical areas shall comply with the provisions of this Program. The building area means the entire area that will be disturbed to construct the home, normal appurtenances (except drainfields), and landscaping.*
2. *Non-conforming lots that do not meet the requirement of subsection K.1 above shall provide the maximum setback and buffer dimension feasible while providing for a building area of not more than 2,500 square feet on the portion of the lot farthest from the required setback or buffer; provided that consideration shall be given to view impacts and all single family residences approved under this section shall not extend waterward of the common-line setback as measured in accordance with Appendix F.*
3. *The area between the structure and the shoreline and/or critical area shall comply with the vegetation conservation standards of SMP 23.90.06.B.3.*
4. *Development may not take place waterward of the ordinary high water mark.*
5. *Facilities such as a conventional drainfield system may be allowed within critical areas or their buffers, except wetlands and buffers, outside of the building area specified above, subject to specific criteria in WCC 16.16.*